

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SHARROD MOTEN,

Plaintiff,

v.

VIETH, *et al.*

Defendants.

Case No. 1:24-cv-00068-CDB (PC)

**FINDINGS AND RECOMMENDATIONS
TO DENY PLAINTIFF'S APPLICATION
TO PROCEED *IN FORMA PAUPERIS***

(Doc. 2)

14-DAY OBJECTION PERIOD

Clerk of the Court to Assign District Judge

Plaintiff Sharrod Moten ("Plaintiff") is a state prisoner incarcerated at Kern Valley State Prison proceeding pro se in this civil rights action filed under 42 U.S.C. § 1983. (Doc. 1). Plaintiff filed the instant action on January 16, 2024, along with a motion to proceed *in forma pauperis*. (Docs. 1-2).

Discussion

The Prison Litigation Reform Act of 1995 ("PLRA") was enacted "to curb frivolous prisoner complaints and appeals." *Silva v. Di Vittorio*, 658 F.3d 1090, 1099-1100 (9th Cir. 2011). Pursuant to the PLRA, the *in forma pauperis* statute was amended to include section 1915(g), a non-merits related screening device that precludes prisoners with three or more "strikes" from proceeding *in forma pauperis* unless they are under imminent danger of serious physical injury. 28 U.S.C. § 1915(g); *Andrews v. Cervantes*, 493 F.3d 1047, 1050 (9th Cir. 2007). The statute

1 provides that “[i]n no event shall a prisoner bring a civil action ... under this section if the prisoner
 2 has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action
 3 or appeal in a court of the United States that was dismissed on the grounds that it is frivolous,
 4 malicious, or fails to state a claim upon which relief may be granted unless the prisoner is under
 5 imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

6 In determining whether a case counts as a “strike,” “the reviewing court looks to the
 7 dismissing court’s action and the reasons underlying it.... This means that the procedural
 8 mechanism or Rule by which the dismissal is accomplished, while informative, is not
 9 dispositive.” *Knapp v. Hogan*, 738 F.3d 1106, 1109 (9th Cir. 2013) (citation omitted).

10 A review of the actions filed by Plaintiff reveals that he is subject to 28 U.S.C. § 1915(g)
 11 and is precluded from proceeding *in forma pauperis* unless Plaintiff was, at the time the
 12 complaint was filed, under imminent danger of serious physical injury. Plaintiff states he has
 13 filed five previous lawsuits and highlights three that are active and/or pending. (Doc. 1 at 3). The
 14 Court takes judicial notice¹ of the following United States District Court cases, although not
 15 exhaustive, which are properly deemed qualifying § 1915(g) strikes: (1) *Moten v. Calderon*, No.
 16 2:23-cv-02595-DOC-SP (C.D. Cal.) (dismissed for failure to state a claim on May 31, 2023,
 17 appeal denied on January 10, 2024); (2) *Moten v. Phiefer*, No. 2:23-cv-06355-DOC-SP (C.D. Cal.
 18 (dismissed for failure to state a claim on September 29, 2023); (3) *Moten v. Abrams*, No. 2:23-cv-
 19 06359-GW (C.D. Cal.) (dismissed for failure to state a claim on September 6, 2023, appeal
 20 denied on January 17, 2024).²

21 Because Plaintiff has at least three qualifying strikes, the issue now becomes whether
 22 Plaintiff has met the imminent danger exception, which requires Plaintiff to show that he is under
 23 (1) imminent danger of (2) serious physical injury and which turns on the conditions he faced at
 24 the time he filed his complaint on January 16, 2024 (with application of the mailbox rule).

25 _____
 26 ¹ Judicial notice may be taken of court records. *United States v. Wilson*, 631 F.2d 118,
 119 (9th Cir. 1980).

27 ² A dismissal for a failure to state a claim is a strike for purposes of 28 U.S.C. § 1915(g).
 28 *Moore v. Maricopa Cty. Sheriff’s Office*, 657 F.3d 890, 893-94 (9th Cir. 2011).

1 *Andrews*, 493 F.3d at 1053-56. Conditions that posed imminent danger to Plaintiff at some
 2 earlier time are immaterial, as are any subsequent conditions. *Id.* at 1053. While the inquiry is
 3 merely procedural rather than a merits-based review of the claims, the allegations of imminent
 4 danger must still be plausible. *Id.* at 1055.

5 Here, Plaintiff asserts Defendants have been tampering with his mail ever since he
 6 entered Kern Valley State Prison on June 9, 2022. (Doc. 1 at 9). Plaintiff claims Defendants
 7 have prevented him from showering multiple times in April 2023, December 2023, and January
 8 2024. *Id.* at 5-6. Plaintiff asserts Defendants have engaged in discrimination and retaliation
 9 against him by initiating a lockdown on October 18, 2023. *Id.* at 4. Plaintiff claims Defendants
 10 have harassed him in multiple instances by searching his cell and person and issuing rules
 11 violation reports against him in March 2023, April 2023, and October 2023. *Id.* at 4-6. Plaintiff
 12 asserts “[on December 11, 2023, through December 13, 2023], Ochoa came to work sick, without
 13 a mask being deliberate and indifferent to the population by not staying at home sick when its
 14 deadly Covid 19 poluting [*sic*] the air.” *Id.* at 5. Plaintiff also claims his wife has been harassed
 15 by Defendants and that his wife’s visits are being taken away. *Id.* at 6-7.

16 Plaintiff has not alleged facts showing that he faced a real, present threat of serious
 17 physical injury at the time he executed his complaint on January 9, 2024. *Id.* at 9. None of the
 18 allegations set forth in the complaint and summarized above show ongoing serious physical
 19 injury, or a pattern of misconduct evidencing the likelihood of imminent serious physical injury.

20 Therefore, the court finds that Plaintiff may not proceed in forma pauperis with this action
 21 and must submit the appropriate filing fee in order to proceed with this action. Accordingly,
 22 Plaintiff’s motion to proceed in forma pauperis should be denied, and he should be precluded
 23 from proceeding with this case until after he pays the \$405.00 filing fee in full.

24 **Conclusion and Recommendation**

25 For the reasons set forth above, the Court DIRECTS the Clerk of the Court to assign a
 26 district judge to this action and RECOMMENDS that:

- 27 1. Plaintiff’s motion to proceed *in forma pauperis* (Doc. 2) be DENIED; and,
- 28 2. Plaintiff be ordered to pay the \$405.00 filing fee in full within 30 days.

1 These Findings and Recommendations will be submitted to the United States District
2 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days of
3 being served with these Findings and Recommendations, Plaintiff may file written objections
4 with the Court. The document should be captioned “Objections to Magistrate Judge’s Findings
5 and Recommendations.” Plaintiff is advised that failure to file objections within the specified
6 time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39
7 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

8 IT IS SO ORDERED.

9 Dated: **January 19, 2024**


UNITED STATES MAGISTRATE JUDGE